NO. 20,400

United States
Court of Appeals
for the Ninth Circuit

JULIA L. BOSTON, TRUSTEE IN BANKRUPTCY,
Appellant,

v.

LUELLA V. GARDNER, BANKRUPT,
Appellee.

Appeal from the United States District Court
For The District of Oregon

THE HONORABLE WILLIAM G. EAST, *Judge*

REPLY BRIEF OF APPELLANT

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STATEMENT OF CASE

About six months before bankruptcy Frederic W. Young, an attorney representing creditors of Mrs. Gardner, subsequently the bankrupt herein, having discovered that the only assets of Mrs. Gardner available to creditors were judgments in divorce decrees of past due child support against two of her former husbands (Severson and Tagliamani) entered into an agreement with Mrs. Gardner to effect collection of the past due child support upon the judgments, the

collection to be applied 50% to Frederic W. Young as his fee for the collection, the moneys then to be applied to the indebtedness owed by Mrs. Gardner to the creditors whom Mr. Young represented and the balance to be remitted to Mrs. Gardner.

The sums accrued and owing on these decrees were scheduled by Mrs. Gardner as amounts owing to her at the time of the filing of her petition in bankruptcy on May 6, 1964. (Hereinafter Mrs. Gardner will be referred to as "bankrupt".) As liabilities she listed debts accumulated over many years totaling about $11,600. These debts included many bills owing to doctors, hospitals, groceries, dairies, utilities, landlords and dealers in merchandise of various kinds.

In April, 1964 Mr. Young caused an execution to be issued on the judgment of the Severson divorce decree with a writ of garnishment to be served upon Severson, a resident of the state of Washington, by serving Friden, Inc. in Portland. At the time of the filing of the petition in bankruptcy the child was eighteen and one-half years old. From this writ Mr. Young recovered $149.33, which sum was in his possesion at the time of bankruptcy. Upon order of Referee Estes Snedecor, Referee in Bankruptcy, United States District Court for the District of Oregon, Mr.

Young, after deducting $4.75 as execution costs, turned over to the Trustee one-half of the net amount realized. At about the time of bankruptcy Mr. Young obtained an offer from former husband Severson of $800 in full satisfaction of the judgment for delinquent installments. In view of the legal difficulties involved in collection of judgments against one spouse only in a community property state, the Trustee recommended the acceptance of the offer subject to the payment of Mr. Young's contingent fee. The question before the court is whether the Trustee is entitled to the proceeds of the offer and is vested with authority to enter a satisfaction of the judgment.

Referee Estes Snedecor, after a hearing in which the Referee personally questioned the bankrupt, entered herein Referee's Opinion, Findings and Order on the 10th day of December, 1964, in which he decreed that the right to collect the judgment for installments of child support accrued and owing at the time of filing of the petition in bankruptcy passed to the Trustee; subsequently, the bankrupt petitioned the United States District Court for the District of Oregon for a review of the Referee's opinion and the Honorable William G. East, in an opinion dated June 30, 1965 reversed the opinion of Referee Snedecor. Appeal from

the decision of Judge East is the matter before this court.

SUMMARY OF REPLY ARGUMENT

Appellee's counsel ably advances theories which are thoroughly applicable to *current* support payments and with which the Trustee does not argue as long as the application is made to *current* payments. Payments *past due* at the filing of the petition in bankruptcy are a different matter.

Certainly, there are child support decrees executed upon by mothers, years after children are no longer dependent upon said mothers, for child support due while children were dependent upon the mother and no one can contend that this past due child support must, at the time of collection, be used for the benefit of the child. The proceeds of the execution are received by the mother as a reimbursement for her advancements to the child from her funds during father's delinquency in making payments and are used, rightly so, by the mother for any use which she determines.

Argument by counsel for Appellee that Trustee is attempting to punish the child is without merit and refuted by direct testimony of Appellee before Ref-

eree Snedecor in which testimony Appellee stated that the Severson Child had wanted for nothing during the default of his father — that she, the bankrupt, had amply supported him, supplied him with spending money required and, further, that the settlement which was now offered would be used for home improvement by the addition of a room to the present home of bankrupt although the minor under consideration here had not been living with his mother for several months prior to the hearing before Referee Snedecor. This is conclusive testimony that Bankrupt Appellee considered this a reimbursement and this attitude on the part of the Bankrupt is further illustrated by her prior assignment for the benefit of creditors of this settlement of past due child support to creditors represented by Frederic W. Young. It has been contended that this assignment was for a small amount of indebtedness. To brush this aside as being a small item too insignificant to indicate the bankrupt's intention is analogous to a finding by a criminal court that a crime of robbery was not committed because the amount of money involved was small.

It is a mental gymnastic of complete nonsense to contend that past due support payments are to be received in a fiduciary capacity when the mother has every right to reimburse herself for necessaries ren-

dered to the child under the principles of trust theory for which Appellee so strongly contends.

I find no cases in which trustee has been precluded from reimbursement from the trust estate for necessaries advanced to the beneficiary of the trust.

Appellant does not contend a theory void as against public policy — rather, counsel for Appellee contends for unjust enrichment of a beneficiary of a trust under the theory of trusts so consistently propounded by him in his arguments and brief.

Appellant agrees that the trustee in bankruptcy takes no title to property which does not belong to bankrupt — but contends that reimbursement for necessaries provided the child during the default of the father is the property of the bankrupt.

Appellant contends that there are no superior valid claims, liens and equities against a reimbursement to the bankrupt from *past due* installments of child support as is hereinafter discussed in line with the trust theory advanced by counsel for Appellee.

Any citations from *Pavuk vs. Sheets,* 108 Ind. App. 494, are dicta unless they refer to pleading under the pleading statues of Indiana. This case was an attempt

by a mother who had supplied support for her children to effect collection of past due support payments. Her failure to effect collection was not attributable to the facts in that case but, rather, attributable to her failure to plead the amounts expended by her, which pleading was required by Indiana law. Each citation by counsel for Appellee is by way of explanation that the plaintiff *in that case* may not collect past due installments without suitably pleading the amounts spent by her in support of the child; therefore, *Pavuk* citings by counsel for Appellee are inapplicable to the facts before this Court.

Appellant has at no time contended that Bankrupt has ownership of funds ordered to be paid for child support, only to reimbursements due bankrupt.

The issues involved here are clearly outside the element of ownership. Appellee contends vigorously for the proposition that the mother is a trustee and accountable to the Court for disbursement made — then, conveniently, disregards the fact that in any accounting to the Court moneys expended by the mother would be credited to the mother as trustee and charged against the trust estate.

The theory application propounded by Counsel for

Appellee is inconsistent with the theory of trusts upon which he bases his opposition to Appellant's position.

Appellee says, in effect,

"The mother is a Trustee, the fund does not belong to her, she is entitled to no part of the past due installments even though she has supported the child over the period of several years during default of the father — the child has wanted for nothing — the child is now entitled to be the beneficiary of the proceeds of a fund for his support even though the support for which the fund was ordered has been already rendered to him from his mother's funds."

There is no principle in the law of trusts which supports double benefits to a beneficiary at the expense of a trustee. Contrarywise, and fortunately for trustee, there is a principle requiring reimbursement to the trustee of any funds advanced by the trustee for the purposes of the trust when the trustee supplied necessaries to a beneficiary and this principle is supported by the theory that to deprive the trustee of reimbursement for necessaries advanced to the beneficiary would unjustly enrich the beneficiary of the trust.

Counsel for bankrupt consistently contends that the mother receives the child support payment as a Trustee. Granted that this is true and that the theory of trusts applies, the mother, in receiving past due installments of child support, is entitled to reimburse herself therefrom.

To hold these payments to be subject to the administration of the bankruptcy Court would *not* violate the purposes for which the payments were ordered nor would it punish the minor for the debts of the parents. It was the testimony of the parent at the hearing before Referee Snedecor that the child had wanted for nothing and that the child had been well provided for at the sole expense of the bankrupt.

There is no attempt here to contract away the assets of a minor; there is nothing void as against public policy in the principle of the law of trusts which allows the trustee reimbursement for funds advanced to the beneficiary of the trust.

Appellant agrees that Trustee takes no title to property which does not belong to the bankrupt but contends that installments of child support *past due* at the date of the filing of the petition in bankruptcy are the property of the bankrupt by way of reimburse-

ments to her as trustee of the trust created by the Decree. The rightful owner of the past due installments is the mother, having derived her title through the principle of reimbursement under the theory of trusts for which counsel for bankrupt so strongly contends.

ARGUMENT I

Custodial parent *does* have ownership of installments of child support past due at the filing of the petition in bankruptcy, having derived title through the trust theory principle of reimbursement to the extent bankrupt-custodial parent has supplied support to the child whose father is delinquent in his child support payments.

The portion quoted in Appellee's Brief at p. 3 from the *Pavuk* case, *supra,* is a quotation out of context and does not refer to the *Pavuk* case, *supra.* This is set forth in said brief as a holding of the *Pavuk* case, *supra,* but it is in fact a dictum explaining a previous case in Indiana and emphasizing that the *circumstances* must be pleaded under Indiana law. The quote cited on p. 3 of Appellee's Brief from p. 501 of *Pavuk* case is a further emphasis that only reimbursement will be allowed under Indiana law and then only under proper pleading.

17A *Am. Jur.*, Divorce and Separation, § 873, page 63, discusses the Oregon case of *State Ex Rel Casey v. Casey*, 175 Or. 328, 153 P. 2d 700, 172 ALR 862, as follows:

> "A mother may institute a contempt proceeding in her own name when the decree orders that the payments be made to her; it is not necessary to state that she brings the proceedings for the use and the benefit of the children. She also has a sufficient interest to be able to enforce the decree where, although the court orders the payments to be made to the clerk of the court, no trustee having been appointed to receive and expend the money, she is entitled to receive it and spend it. . . ."
>
> "The mother is not required to plead and prove the amount she spends for the support of her children during the period of the father's delinquency, nor is the court concerned with the use which she may make of the money which the husband is ordered to pay by the judgment of contempt. . . ."

In the *Casey* case, *supra,* all the children had reached majority. It would have been impossible for the support payments to be used for the maintenance and support of minor children. This case definitely represents a reminbursement to the mother as in the case of the bankrupt herein.

> "Where the father is liable for support furnished by the mother after divorce, the liability is usually enforced in an action at law for necessaries furnished a minor. It has been held that a moth-

> er who has furnished such support has her choice of a common law action or a petition to open the judgment of divorce." 17A *Am.Jur.,* Divorce and Separation, 871, p. 61.

The fact that the bankrupt herein chose to levy upon the judgment rather than to bring a contempt proceeding or to sue on the debt to her was a matter of convenience and did not change the character of the debt due from the father to her.

Each of the following Oregon cases *Bennett v.* Bennett, 208 Or. 524, 302 P.2d 1019 (1956); *Cogswell v. Cogswell,* 178 Or. 417, 167 P.2d 324 (1946); and *Nelson v. Nelson,* 181 Or. 494, 182 P.2d 416 (1947), supports the definition of the *Casey* case, *supra.*

OTHER CASES cited by Appellee are inapplicable to the case in point as follows:

Jackson v. Jackson, 204 Ga. 259 (49 S.E. 662), concerned a pleading question under Georgia law. The holding of the case was that the husband was entitled to have the affidavit of execution on judgment follow the wording of the judgment. I am unable to find the portion quoted by counsel in the Georgia report of the case.

Thomas v. Holt, 29 Ga. 133, 134 (49 S.E. 662). This

case involved an attorney seeking an accounting for payment of past due as well as current payments received by wife for whom attorney had secured partial payment on the past due. Note: Georgia law requires a suit to be brought by the mother for the benefit of the children. Oregon law does not so require as illustrated in the *Casey* case, *supra*.

Brown v. Brown, 210 Ga. 233, 78 S.E.2d 516. The court said at p. 235;

> "The question presented for decision by the record before us is whether subsequent cohabitation by husband and wife ipso facto annuls and sets aside the previous decree for alimony, or whether it remains of full force and effect and is res judicata as to rights of wife to recover temporary alimony and attorney's fees for herself and minor child in a divorce and alimony proceedings instituted by her following a later separation, until the former decree for permanent alimony has been vacated and set aside in the Court where the prior verdict and decree were rendered."

The court held that the right of the wife to alimony for herself was not res judicata and that voluntary cohabitation rendered void judgment for alimony to her but did not effect the award to the children.

NOTE: This court used the expression *"alimony* for support of minor child". (Emphasis added.)

Varble v. Hughes, 52 S.E.2d 303. This case also discusses "alimony for the benefit of minor children" and states that "the parents themselves cannot by subsequent agreement nullify or modify the final decree so as to deprive the children of the *alimony* granted by the verdict and decree." In the case before the court at this time there is no question that the Severeson child has been denied support. It is agreed that ample support has been furnished by the mother.

Glaze v. Strength, 186 Ga. 613. Holds that parents may not agree among themselves that payments need not be made. The wife had released all claims of alimony (presumably future) for herself and for her child for $400. 00.(Parenthetical material added.)

NOTE: This court also called this payment alimony for the child.

Stewart v. Stewart, 217 Ga. 509. Holds that refusal of mother to allow visitation of father does not nullify duty of father to pay *"alimony for support of children"* unless visitation rights are a condition precedent to the payment of alimony. (Emphasis added.)

NOTE: This court terms child support "alimony for support of children" — page 510 (3).

Stonehill v. Stonehill, 146 Ind. 445, 45 N.E. 600. Involved attachment for contempt of court and stated that imprisonment for contempt for failure to pay money as ordered by the court is not imprisonment for debt within the meaning of the Constitution.

Hutchinson v. Wood, 59 Ind. App. 537, 540. The decree under consideration here stated:

> "Court further finds for the plaintiff in the sum of $400.00 against the defendant as *alimony*, to be used for the support of the children . . ." (Emphasis added.)

The Supreme Court held that the decree ordering a judgment against husband for alimony for the support of children becomes a lien upon real property which was the only question presented for clarification in the *Hutchinson* case, *supra*.

Ohio Cas. Ins. Co. v. Mallison, et ux, 223 Or. 406. This case involved the violation of the fiduciary relationship between the parents and the child and it concerns the parents giving a release to an insurance company for payment to them which apparently was disproportionate to the damages received by the child and the case turned on the principle that the agreement has the tendency to place the parent in a position where his interest will conflict with that of his

child, and that the agreement therefore violates the principle that one who is a fiduciary for another may not undertake an obligation inconsistent with his fiduciary duty. This case is inapplicable under these circumstances because the past due installments of child support, being in the nature of a reimbursement, are the property of the mother and there is no conflict of interest.

17 *Attorney General Opinions,* Oregon 447 involved the release of a tort claim by or against a child, executed by his parents. This opinion has no application to the case before the Court.

14 *Attorney General Opinions,* Oregon 287 holds:

> "A parent cannot offset against a debt from him to a bank the deposit of his minor child."
> and
>
> "A father has no title to the property of his minor child nor custody nor control of it."

This Opinion states that the father cannot contract away his child's rights. In the case before the court the child's rights are not concerned since the child has had the benefit of the mother's resources in an amount equal to or in excess of the payments required to be made by the father. The claim is that of the bankrupt and not of the child.

C. F. Simmermaker v. International Co., 230 Iowa

845. This case concerned two rival claimants to fixtures; neither of the claimants was a bankrupt, his trustee or any creditor.

Wyatt v. Duncan, 149 Kan. 244. Concerns conditional vendor who had repossessed goods prior to bankruptcy. The trustee contended this was a transfer within four months of bankruptcy and instituted action to recover from the surety for failure of the surety to pursue replevin. Clearly, no application here.

The decision of Judge East in the matter before this court appeared to be based upon his conclusion that the bankrupt lacked ownership of the funds payable under the Decree. Both the Judge and the Counsel for the bankrupt appear to accept the theory of trusts and place the mother in the position of a Trustee. With this theory the Trustee in Bankruptcy is in complete agreement and fails to understand why counsel for bankrupt, while definitely and emphatically propounding the theory of trust on which to base the claim of the bankrupt to the funds, resists the principle of trusts which allows reimbursement and exoneration of the trustee (in which position counsel for bankrupt and Judge East placed the bankrupt.)

54 *Am. Jur.,* Trusts, §514 discussing reimbursement and exoneration of the Trustee:

> ". . . as between the Trustee and the Trust Estate the latter ultimately is to bear the cost of all expenses and liabilities properly incurred by the Trustee in the administration of the Trust. If the Trustee advances his own money or uses his own property in discharging such properly incurred obligations, he is entitled to reimbursement out of the trust estate; or if he has not in fact advanced his own money or used his own property to satisfy such obligation he is entitled to exoneration, that is, to use or apply the Trust funds or property in the discharge of the liability. In a proper case a creditor may, upon the theory of the subrogation, be substituted to the Trustee's right of exoneration.
>
> "As between himself and the Trust Estate, a Trustee is entitled to reimbursement or exoneration not only where he enters into a contract which is proper in the administration of the Trust and is binding upon him personally, but also in cases where, without personal fault on his part, he is subjected to tortious liability in the administration of the estate. . . .

". . . the right of a Trustee to reimbursement or exoneration does not depend upon knowledge or consent of the cestuis que trust to the expense incurred, . . ."

54 *Am. Jur.,* Trusts, §516, consideres the lien or charge on the trust estate created by the Trustee's right to reimbursement:

> "A Trustee entitled to reimbursement or exoner-

ation out of the trust estate for liabilities properly incurred in the administration of the trust is generally regarded as having a security interest in or lien on the trust estate, and he may retain control thereof until he receives such reimbursement or exoneration. Such a charge or lien upon the Trust property for reimbursement *does not affect the question of the actual and beneficial ownership of the subject of the trust.* (emphasis added).

"The charge or lien of a trustee for reimbursement for expenditures *is superior to the interest of the beneficiaries of the trust.* (emphasis added) "Where a Trustee has paid off an encumberance on Trust property or purchases it or an outstanding title to it, acting in his sound discretion to protect it, he is entitled to reimbursement, and he may retain the property freed or purchased as security for expenditures that he has made in the transaction out of his own funds."

54 *Am. Jur.*, Trusts, §519, discusses advances to beneficiaries for support:

"The cases vary in their conclusions on the questions of the right of Trustee to reimbursement for advances of his own funds in making payments to beneficiaries at a time when trust funds are not available, . . . These conflicting views extend to cases involving the right of a Trustee to reimbursement for advances from his private fund made to the beneficiary of a support or spendthrift trust. Reimbursement has been limited, at least where payment is made to beneficiary without knowledge on his part of the deficiency of trust funds and that the payment is out of the private funds of the Trustee, to income subsequently received on the identical in-

> vestments which were in default. A Trustee is entitled to reimbursement for support of a beneficiary out of his own means . . . irrespective of the means of the Trustee and of the fact that the Trustee is under duty to support the beneficiary . . ., as is the case where the beneficiary is the child of the Trustee."

Restatement of Trusts, §244:

> "The Trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust . . .
> "b. *Indemnity by way of exoneration or reimbursement.*

If the Trustee properly incurs the liability in the administration of a trust, he is entitled to an endemnity out of the trust estate either by way of exoneration, that is by using trust property and discharging the liability so that he will not be compelled to use his individual property in discharging it, or by way of reimbursement, that is, if he has used his individual property in discharging the liability, by repaying himself out of trust property.

"c. *Lien for indemnity.* To the extent to which the trustee is entitled to indemnity, he has a security interest in the trust property. He will not be compelled to transfer the trust property to the beneficiary or to a transferee of the interest of the beneficiary or to a

successor trustee until he is paid or secured for the amount of expenses properly incurred by him in the administration of the trust."

ARGUMENT II

Bankruptcy Trustee Appellant seeks no title to property which does not belong to the bankrupt and agrees that trust property should be turned over to its rightful owner.

In the case in point the rightful owner of the past due payments is the Appellee — to whose property the bankruptcy trustee takes title. Agreeing with Counsel for Appellant that this is trust property — it is subject to a charge by the mother — trustee of the fund, for reimbursement to her for her funds expended for necessaries supplied the beneficiary of the trust and her charge against the fund has priority over any claim of the beneficiary of the trust. A trustee's claim for reimbursement is certainly available to the trustee's creditors. The mother - trustee has a personal right in these funds under the principles of trust law which law counsel for Appellee thoroughly embraces on her behalf but refuses to follow through to the logical conclusion an application of the law of trusts relative to reimbursement of trustee for amounts advanced by her.

Whether or not child support and alimony are synonymous is of little import if we pursue the theory of trusts with which counsel for bankrupt appears to be so enamored. On Page 6 of Appellee's brief, the last paragraph being "certainly there can be no contention that the support monies would be subject to garnishment for custodian's debts." Appellant makes such a contention based upon the following:

Scott's Abridgment of the Law of Trusts §267:

> "Examination of the authorities discloses that there is support for each of the following theories to justify a recovery out of trust estate by third person to whom the trustee has incurred a liability in the administration of trust.
>
> 1. The creditor is entitled to obtain satisfaction of his claim out of trust estate if and through the extent that the trustee is entitled to indemnity out of the trust estate.
>
> 2. The creditor is entitled to obtain satisfaction of his claim out of the trust estate if and to the extent that the trust estate has been benefited by the transaction out of which his claim arose, even though the trustee is not entitled to indemnity out of the trust estate.

Scott's Abridgement of the Law of Trusts § 268:

> ". . . A more accurate statement is that the third person is entitled to maintain a bill in equity against the trustee for equitable execution, a creditor's bill, a bill to reach and apply to

the satisfaction of his claim assets which could not be reached in an ordinary proceeding at law.

"This method of reaching the trust estate through the trustee's right of indemnity has found acceptance in England and in most of the States. Accordingly, it has been held that a person with whom a Trustee makes a contract in the proper administration of a trust, and who cannot obtain satisfaction of his claim in an action at law against the trustee personally, is entitled to maintain a bill in equity against the trustee to reach the trust estate to the extent to which the trustee is entitled to exoneration out of the trust estate. See *Mason v. Pomeroy,* 151 Mass. 164, 24 N.E. 202 (1890)"

Scott's Abridgment of the Law of Trusts §268.1:

"A person to whom a trustee has incurred a liability in the administration of the trust cannot maintain a proceeding in equity to reach the trust estate through the trustee's right of exoneration if he has an adequate remedy against the trustee personally in an action at law. In some cases it has been held that the creditor must first obtain a judgment against Trustee and have the execution return nulla bona before he can bring a bill for equitable execution. In most states, however, he is permitted to maintain a suit in equity without having first obtained a judgment at law, if the trustee has no assets which could be reached by legal execution. *It is sufficient that the trustee is insolvent* . . . (Emphasis added)

Scott's Abridgment of the Law of Trusts, §269:

". . . Where a person, not acting officiously or

> gratuitously has conferred a benefit upon the trust estate, he can by proceeding in equity reach trust property and apply it to the satisfaction of his claim to the extent which the trust estate was benefited. The relief thus given him is based upon the general principle that one person should not be unjustly enriched at the expense of another, that if the trust estate is enriched at the expense of a third person, it would be inequitable to deny to the third person a recovery out of the trust estate. This is true whether the benefit was conferred under a contract made by the trustee with the third person, or as the result of a tort committed by the trustee against the third person or where the third person confers a benefit upon the trust estate under such other circumstances that the estate is unjustly enriched . . ."

ARGUMENTS III AND IV

The custodial parent acquires no proprietary interest in child support payments made *currently* and in accordance with the decree ordering the payments to be made; however, payments past due at the date of the filing of Petitions in Bankruptcy are in the nature of reimbursement to the mother for her own funds already advanced for the support of the child and, through the principle of reimbursement of the law of trusts, the mother, as trustee, is entitled to reimbursement for any funds expended by her, said reimbursement limited only by the amount ordered in the decree.

It has consistently been the policy of the Bankruptcy Court of the United States District Court for the District of Oregon to rule that installments of child support past due at the date of the filing of the petition are assets of the bankrupt's estate.

The *Case of Ohio Casualty Insurance Co. v. Mallison*, 223 Or. 406, 354 P2d 800 (1960) involved the waiver of a tort to a child and have nothing whatever to do with assets in the nature of a reimbursement of a parent of the child. The quotations from 46 *CJ*, appearing on Page 13 of Appellee's Brief refer to waiver of liability for tort and cannot possibly be applicable to the case under consideration either in theory or in fact. Counsel for bankrupt quotes at page 13 from a citation of *Jackson v. Jackson*, 204 Ga. 259, setting forth what has to be dictum in that case because, as reflected on page 12 of this brief, the Jackson case was a holding concerning pleading under the laws of the State of Georgia and the sole finding of the case was that the husband was entitled to have the affidavit of execution on judgment following the wording of the judgment. I have been unable to find, in the Georgia report of this case, the quote shown by counsel in his brief.

On page 14, counsel discusses the case of *Howard v. Cassels* 105 Ga. 412, (rather than 142 as stated in

bankrupts brief). Any quote from this case other than one regarding the pleading question involved there as to the necessary parties to that suit is a quotation of dictum in the case.

On the same page counsel discusses *Thomas v. Holt*, 29 Ga. 133, which is inapplicable to the facts in this case since Mr. Thomas, as an attorney, was seeking an accounting from the mother of current payments received in order to ascertain his fee. The appellant herein makes no claim to current payments and any discussion of current payments is inapplicable to the question before the Court. On page 15 of Appellee's Brief there is another quote from the case of *Pavuk v. Sheets, supra.* This case was first quoted by counsel for bankrupt and appellant has at all times contended that the portion cited by counsel for bankrupt is dictum. Reference to Page 2 of Trustee's Answering Memorandum and Memorandum of Authority as originally presented herein will show that there is opposing dictum in the same case and that the case turned on the fact that the mother had not pleaded in accordance with the pleading laws of the State of Indiana. Any quotation from this case not regarding the pleading question is dictum and of no avail here. A reading of the *Pavuk case, supra,* will reveal that it did not fail *because of proof* as specified in Appellee's

Brief. It failed long before the proof stage *because of failure to meet the code pleading requirements of the State of Indiana* and it does not distinctly hold that support payments are received by custodial parent as a fiduciary, rather, it holds that the mother cannot maintain a case in Indiana without a pleading in accordance with the pleading code of the State of Indiana.

Citations by Counsel for bankrupt from 46 CJ 102, 128 and 1298 pertain to tort liability and this question is not before the Court.

Counsel for bankrupt places special emphasis on the *Thomas v. Holt* case, *supra*, but the holding therein mentions only current and future payments and is silent concerning past due payments.

Appellant suggests that headnotes were cited throughout Appellee's brief without regard to a reading of the facts in the cases cited. A reading of the factual situation of the cases and opinions substantiates Appellant's position rather than Appellee's.

CONCLUSION

Whether or not the obligation of support is dischargeable in bankruptcy is not before the Court at this time and it is well settled that it is not dischargeable in bankruptcy. The appellant is not concerned with the dischargeability of the payments for child support or any payment due on or after the date of the filing of the petition herein. To say now that money paid for months and years past should be directed only to the benefit of the child is a mental gymnastic of fantastic proportions. The child was well supported by his mother during the time that the father was delinquent in his support payments and to rule now that the payments past due at the date of the filing of the petition in bankruptcy are to be used for the benefit of this child would result in unjust enrichment to the beneficiary of a trust for which Appellee contends. The child was supported once, wanted for nothing according to his mother's testimony, and to again allow this payment not to be applied to the creditors who in effect supported this child during that father's delinquency is indeed inequitable. There is no legislative nor legal intention evidenced that all funds received, no matter at what time, should be expended beneficially for the child or children involved; rather, the in-

tent and practice is to reimburse the parent who has supplied support during the delinquent period.

Clearly, the child — having been supported once — is not entitled to have support again for the same period of time while th creditors who supplied family necessaries are forced to discharge the obligations for those necessaries.

The inequities visited upon creditors by the District Court's overruling Referee Snedecor's opinion must, in all good conscience, be alleviated by a judgment of this Court.

Respectfully submitted,

JULIA L. BOSTON

Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIA L. BOSTON
Attorney for Appellant.